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1979

# John P. Condas et al v. George J. Condas et al :Petition for Rehearing

Utah Supreme Court

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Claron C. Spencer; Attorney for Plaintiffs and Respondents;

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN P. CONDAS, GEORGE P.  
CONDAS, HARRY P. CONDAS,  
MARGARITA CREGLOW ELLIS  
and TESSIE MADSEN,  
Plaintiffs and Respondents, )

vs. )

CASE NO. 15669

GEORGE J. CONDAS, MARY  
CONDAS LEHMER, CHRIS J.  
CONDAS, NICK J. CONDAS,  
ELLEN CONDAS BAYAS,  
ALEXANDRA CONDAS OCKEY and  
J. CONDAS CORPORATION, a  
Utah corporation, )

Defendants and Appellants. )

---

PETITION FOR REHEARING

---

BRIEF OF DEFENDANTS-APPELLANTS

---

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Appellants George J. Condas,  
Mary Condas Lehmer, Chris J.  
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Utah corporation, )

CASE NO. 15669

Defendants and Appellants. )

---

PETITION FOR REHEARING

---

Defendants-Appellants petition the above-entitled Court pursuant to Rule 76(e), Utah Rules of Civil Procedure, for a rehearing of the above-entitled case and allege that the Court erred in the following particulars:

POINT I

THE COURT ERRED IN ITS OPINION THAT THE  
ABSTRACT OF RECORD IN SULLIVAN V. CONDAS  
(SUPREME COURT CASE NO. 4922) IS ADMISSIBLE  
AS EVIDENCE IN THIS CASE.

The opinion of this Court holds that the abstract of the record in Sullivan v. Condas (hereinafter Sullivan) is admissible in evidence and is sufficient to support the Findings and Judgment of the trial court in this case. In so doing, it

accords such evidence with high respect for accuracy and veracity, thus meeting the general objection to hearsay evidence. However, the opinion of this Court overlooks the fact that such abstract is not a record of all of the evidence offered under oath in the Sullivan lower court but is simply a summary of those proceedings in that court which were pertinent to the Sullivan appeal. It is only a partial record of what happened in the Sullivan lower court based on all of the evidence offered and received therein. Thus, the partial record in this case does not contain all of the evidence on which the Sullivan case was decided.

To admit that partial record as evidence not under oath in this case as a supportable basis of deciding the whole of this case is to sanction a decision in this case on the basis of evidence not in the record before the court below. To permit such result, as the opinion of this Court does, establishes a dangerous precedent and runs afoul of the time-honored rule that the findings of all triers of fact, either court or jury, must be based on the testimony of witnesses or other evidence made a part of the record. Salt Lake City v. United Park City Mines Company, 28 Utah 2d 409, 503 P.2d 850 (1972). Defendants respectfully urge this Court to reconsider its opinion in light of the dangerous precedent which it sets. Likewise, defendants respectfully urge this Court to reconsider its opinion in light of the time-honored rule of confining judicial decisions to the record before the Court.

## POINT II

THE COURT ERRED IN ITS OPINION THAT THE PARTIAL TESTIMONY OF DECEASED WITNESSES CONTAINED IN THE ABSTRACT OF RECORD IN SULLIVAN V. CONDAS IS ADMISSIBLE AS EVIDENCE IN THIS CASE.

The opinion of this Court holds that the abstracted testimony of selected witnesses in the prior case of Sullivan v. Condas (hereinafter Sullivan) fully meets the requirements of Rule 63(3) (b) (i) and (ii), Utah Rules of Evidence, and are admissible as evidence in this case to support the findings of the trial court that a public roadway had been established across the property of John C. Condas, predecessor of defendants in this action. However, the opinion of this Court either overlooks or ignores the requirement that the whole substance of the whole of the former witnesses' testimony on the particular point or issue involved in the previous trial must be proved, including both testimony given on the direct examination and the testimony given on cross-examination. Thus, as stated in the Annotation appearing in 11 ALR 2d 30, Sec. 7, page 45:

"The whole substance of the witness' entire testimony on the particular subject must be reproduced, including the evidence given on both the direct and the cross-examination."

Under Sec. 32, II, on page 112 it is further stated:

"The whole substance of the whole of the former witness' testimony, or at least the substance of the whole testimony on the particular point or issue involved in the previous trial, must be proved, including both testimony given on the direct examination and the testimony given on the cross-examination,



Likewise, in 29 Am.Jur.2d, Evidence, Sec. 762, at page 832, it is stated:

Even Wigmore, Evidence, (Chadbourn Revision), Sec. 2107(c) cited in footnotes 4 and 5 in the Court's Opinion states:

Here the trial court heard and considered only abstracted parts of selected testimony from the prior Sullivan case. It did not hear the whole of all of the testimony of each selected witness including both direct and cross-examination. It was plaintiffs who sought to prove the prior testimony and it was plaintiffs' burden to produce the whole of the testimony of each selected witness. It was not defendants' burden to supply the missing parts. Plaintiffs failed to meet their burden. Yet the trial court decided the whole of this case on such partial testimony and committed reversible error in so doing. The opinion of this Court gives its approval to

### POINT III

THE COURT ERRED IN REFUSING TO DECIDE WHETHER  
THE TRIAL COURT COMMITTED ERROR IN TAKING  
JUDICIAL NOTICE OF THE FINDINGS OF FACT AND  
CONCLUSIONS OF LAW IN SULLIVAN V. CONDAS.

The opinion of this Court concludes that its determination that the Sullivan evidence is admissible is dispositive of the claimed error of the trial court in taking judicial notice of the pleadings in Sullivan. However, such determination by this Court is limited to the admissibility of the prior testimony of deceased witnesses under Rule 63(3)(b)(i) and (ii), Utah Rules of Evidence, and the Answer and Counterclaim of John G. Condas as a judicial admission. The opinion cites McCormick, Evidence 2d, Sec. 265 (1976) in support of the judicial admission which is more applicable to the rigid rules of pleading under the common law system. Thus, on page 634 thereof it is stated:

"The modern equivalent of the common law system is the use of inconsistent, alternative, and hypothetical forms of statement of claims and defenses. It can readily be appreciated that pleadings of this nature are directed primarily to giving notice and lack the essential character of an admission. To allow them to operate as admissions would render their use ineffective and frustrate their underlying purpose. Hence the decisions with seeming unanimity deny them status as judicial admissions, and generally disallow them as evidential admissions."

The opinion of this Court summarily casts aside the asserted error of the trial court in taking judicial notice of the Findings of Fact and Conclusions of Law in Sullivan. Yet,

this issue is squarely raised under Point I(5) in the Brief of Defendants-Respondents and under the authorities cited therein the rule is clear that neither the trial court nor this Court on appeal can take judicial notice of the Findings of Fact or Conclusions of Law in Sullivan. In Finding No. 7 (R.212), the trial court made a specific finding of what the district court in Sullivan found. But what is even more disturbing is that Finding No. 4 herein (R.212) superimposes over defendants' lands herein, the identical language of Finding No. 8 in Sullivan which was there limited to the lands of Sullivan.

Defendants respectfully submit that it was error for the trial court to take judicial notice of the Findings of Fact and Conclusions of Law in Sullivan and to make findings in this case based thereon. The trial court committed reversible error in founding its Decree on such findings. Likewise, it was error for this Court to refuse to decide that issue since it was squarely raised on this appeal.

#### POINT IV

THE COURT ERRED IN SUMMARILY CONCLUDING THAT THE NON-SULLIVAN EVIDENCE DOES NOT CLEARLY PREPONDERATE AGAINST THE TRIAL COURT'S FINDINGS.

The opinion of this Court notes that the existence of the public road in the canyon is supported by evidence other than the Sullivan evidence in this case, as the District Court specifically found. It then concludes that the evidence does not clearly preponderate against the District Court's findings

under the rule of review in equity cases.

As noted in Provo City v. Lambert, Utah, 574 P.2d 727 (1978) in an equity case, this Court reviews the facts, as well as the law, and only reverses if the evidence clearly preponderates against such findings. Likewise, the same rule of review applies concerning a judgment which must be supported by clear and convincing evidence. Maytime Manor, Inc. v. Stokermatic, Inc., Utah, 597 P.2d 866 (1979). Where, as here, such findings are not only unsupported by the evidence outside of the Sullivan evidence but are contrary to the overwhelming weight of the evidence, such findings must be set aside and the Decree based thereon must be reversed.

Defendants-Appellants' Brief devoted some 12 full pages analyzing the evidence as fully documented by references to the record. Defendants are at a loss to understand how this Court on review of the facts in the record could conclude that the findings of the trial court are supported by evidence other than the Sullivan evidence. Likewise, defendants are at a loss to understand how this Court could summarily conclude that the non-Sullivan evidence does not preponderate against such findings in its application of the rule of review. Such rule of review when summarily applied to this case is a rule of no substance or meaning.

The record in this case establishes an unbroken chain of overwhelming evidence that from 1903 to 1950 only a trail existed up White Pine Canyon beyond the first stream crossing above the John T. Bondas buildings. Such facts are conclusively

established by plaintiffs' own live witnesses during the period 1903 until 1922. Further, such facts are conclusively established by defendants' documentary evidence and live witnesses from 1903 until the present time. Likewise, such facts were found by the trial court in its Finding Nos. 9 and 10 (R.213) during the period from 1925 to the time of trial.

Thus, in Finding No. 9 the trial court specifically found that during the years 1925 to 1928 John G. Condas constructed a wooden gate of only sufficient width to permit passage of a person riding horseback across the roadway near the southerly end of his pasture, and in Finding No. 10 it found that the main gate was maintained in a closed condition, locked and unlocked, and was generally posted with "keep out" or "no trespassing" signs since the construction thereof until the time of trial. To say, as the opinion of this Court does, that there is no tension between these findings and the general findings of a public road is to ignore all of the public thoroughfare cases ever decided by this Court and all of what they stand for. It should be obvious to anyone who reviews this record that it would be impossible to drive a three-fourtns ton pickup through a gate of only sufficient width to permit passage of a person riding horseback. Those findings are in direct conflict with its general findings of a public roadway and cannot be reconciled.

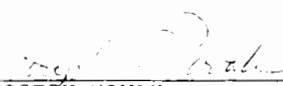
Admittedly, the record in this case is very lengthy, but this Court had some 19 months from the time of oral argument until the time of decision within which to carefully review

that record as it should do in this, an equity case. The opinion of this Court simply does not give adequate treatment to this aspect of the case and defendants respectfully submit that it should. Defendants respectfully urge that this Court reconsider its opinion in light of the overwhelming evidence and the irreconcilable conflicts in the findings.

#### CONCLUSION

Defendants respectfully petition this Court to rehear this matter and reconsider its opinion in light of the above claims of error. The net effect of the Judgment of the trial court is to change the status quo of the previous 54 years of privacy of the defendants' land and opens those lands to the general public which has to be an incredible and unjust result. The opinion of this Court now condones that end result and all on the basis of the Abstract of Record in Sullivan, not under oath, and only a partial record of the proceedings therein which defendants respectfully submit was incompetent and inadmissible evidence in this case.

Respectfully submitted,

  
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Salt Lake City, Utah 84101

CERTIFICATE OF MAILING

I hereby certify that on the 22 day of October, 1980,  
I mailed two (2) copies of the foregoing Petition for Rehearing  
to Claron C. Spencer, attorney for Plaintiffs-Respondents,  
1200 Beneficial Life Tower, 36 South State Street, Salt Lake  
City, Utah 84111.

  
\_\_\_\_\_  
Attorney